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No. 05-1342

IN THE

Supreme Court of the United States

LINDA A. WATTERS, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES,

Petitioner,

v.

WACHOVIA BANK, N.A. and WACHOVIA MORTGAGE CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, PUERTO RICO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICI CURIAE

Along with Petitioner, the State of Michigan, the forty-nine amici States, the District of Columbia and Puerto Rico have the responsibility of regulating corporations - both domestic and foreign - for the purpose of protecting their residents against fraudulent, abusive, and discriminatory practices. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987); *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 208 (1944). Even in the area of banking, which is heavily regulated by the federal government, States have a strong interest "in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds," and retain the "authority to protect the interests of their consumers, businesses, or communities" in this area. H.R. Conf. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2071; *see also Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980) ("[B]anking and related financial activities are of profound local concern . . . . [S]ound financial institutions and honest financial practices are essential to the health of any State's economy and to the well-being of its people.").

Amici therefore urge reversal of the Sixth Circuit Court of Appeals' decision in *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005), which improperly prevented Michigan from enforcing its licensing laws against a state-chartered, nonbank mortgage lender doing business in the State as an operating subsidiary of a national bank. The court preempted these state laws pursuant to a regulation promulgated by the Office of the Comptroller of the Currency ("OCC"), codified at 12 C.F.R. § 7.4006, prescribing that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."

That regulation, and more recent ones promulgated by OCC, seek to oust the States from their traditional consumer protection role with respect to not only national banks, but their operating subsidiaries, which are organized under state law. Section 7.4006, at issue here, was promulgated in 2001 and preempts the application of state law to a national bank's

operating subsidiary as if it were the parent bank. In 2004, OCC also amended its visitorial powers regulation, 12 C.F.R. § 7.4000, seeking for the first time to preempt States from judicially enforcing even their nonpreempted laws against national banks and their operating subsidiaries. On the same day, OCC promulgated preemption regulations at 12 C.F.R. parts 7 and 34, which seek to "clarify" the preemption standard applicable to state laws affecting national banks and their operating subsidiaries. Under the standard adopted by these regulations, state laws that more than "incidentally affect" the business of banking are preempted. *See* 12 C.F.R. §§ 7.4007, 7.4008, 7.4009, and 34.4; *see also* 69 Fed. Reg. 1904, 1910-11 (Jan. 13, 2004).

The scope of these rules and their impact on state enforcement authority is unprecedented. Federal law has never been interpreted to give OCC exclusive authority over a state-chartered corporation, and until 2001, OCC had disclaimed such power. *See* 64 Fed. Reg. 60,092, 60,095 (Nov. 4, 1999); OCC Interpretive Letter, 1988 WL 282227 (June 7, 1988). Also, this Court has long held that States have inherent authority to enforce their nonpreempted laws against national banks, *see First Nat'l Bank v. Missouri*, 263 U.S. 640 (1924), and until now OCC had not taken a contrary position.[1] *See* OCC Interpretive Letter, 1990 WL 362185 (Oct. 26, 1990). And this Court has consistently held that state laws apply to national banks unless they "impair significantly" – not merely incidentally affect – "the exercise of a power that Congress explicitly granted." *Barnett Bank v. Nelson*, 517 U.S. 25, 33 (1996).

If § 7.4006 is allowed to stand, it would render States powerless to protect their residents from abusive and discriminatory consumer practices by state-created entities that are operating subsidiaries of national banks. OCC would usurp that function, even though it is ill-equipped to perform it. OCC's primary responsibility and focus is not the well-being of a State's residents or the state-chartered subsidiary;

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[1] A challenge to 12 C.F.R. § 7.4000 is pending in the Second Circuit. *See The Clearing House Ass'n, L.L.C. v. Spitzer*, No. 05-5996-cv(L) (2d Cir. filed Nov. 7, 2005).

it is, appropriately, the safety and soundness of the bank, as a federally insured depository institution. Indeed, OCC has informed the General Accounting Office ("GAO") that it does not even have procedures for examining compliance with state law. *See* U.S. Government Accountability Office, *OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Consumer Protection Laws to National Banks* 22-23 (2006).

States, by contrast, have greater expertise in enforcing their laws and have enforced state laws prohibiting abusive financial practices more vigorously than has OCC.[2] States are more familiar with local conditions and practices than is the federal government and can more quickly recognize and respond to new predatory practices as they arise. And as OCC increasingly permits national banks and their subsidiaries to expand into nonfinancial areas,[3] the States' expertise and experience in identifying abuses in those areas will become even more essential to protecting consumers' interests.

SUMMARY OF ARGUMENT

In the sparse rulemaking accompanying § 7.4006, OCC gave no statutory basis for preempting the application of state laws to a national bank's operating subsidiary to the same

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[2] For examples of state enforcement efforts against operating subsidiaries under state laws, *see Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001) (state enforcement action under state consumer fraud and deceptive practices law); Complaint, *State v. First Horizon Home Loan Corp.*, No. 272/2004 (N.Y. Sup. Ct. filed Jan. 16, 2004), *available at http://www.oag.state.ny.us/press/2004/jan/Horizon5.pdf* (state enforcement action under state unlawful debt collection and deceptive practices law).

[3] *See, e.g.*, OCC Conditional Approval No. 535 (June 21, 2002) (operating roadside assistance programs constitutes the "business of banking"); OCC Corporate Decision # 97-60 (July 1, 1997) (brokering used car sales and taking a fee for referring customers to "national auto service companies, such as Firestone, Jiffy Lube and other appropriate parties" constitutes the business of banking); *see also* Comptroller of the Currency, *Activities Permissible for a National Bank* 3, 5 (2005), *available at http://www.occ.treas.gov/corpapps/BankAct.pdf* (last visited Aug. 30, 2006) (Medicare and Medicaid counseling and handling benefit payments; providing "welfare-to-work" counseling).

extent that application of these laws to the parent bank is preempted. OCC blithely stated only that the "[§ 7.4006] itself does not effect preemption of any State law; it reflects the conclusions we believe a Federal court would reach, even in the absence of the regulation, pursuant to the Supremacy Clause and applicable Federal judicial precedent." 66 Fed. Reg. 34,784, 34,790 (July 2, 2001). In a subsequent rulemaking, OCC stated that § 7.4006 is based on its interpretation of the "incidental powers" of a national bank as including the use of an operating subsidiary to conduct the business of banking. *See* 69 Fed. Reg. 1895, 1900 (Jan. 13, 2004) (citing 12 U.S.C. § 24 (Seventh)). Because OCC exercises exclusive visitorial power over a national bank, *see* 12 U.S.C. § 484, and because, according to OCC, operating subsidiaries are "no more than incorporated department of the bank," OCC believes it can also exercise exclusive visitorial power over the subsidiaries as well. *See* 69 Fed. Reg. at 1900.

By its express terms, however, § 484's exclusive visitorial powers' provision applies only to a "national bank." It is not surprising, then, given that a state-chartered nonbank corporation cannot be described as a "national bank," that the Sixth Circuit did not uphold § 7.4006 as a correct or even reasonable interpretation of the National Bank Act ("NBA").[4] *Cf. Bd. of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 375 (1986) (Federal Reserve Board cannot by regulation alter the definition of "bank" in the Bank Holding Company Act); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 626 (1971) (Comptroller cannot narrow the meaning of "securities" in 12 U.S.C. § 24 (Seventh)).

Instead, the court viewed § 7.4006 as a preemptive regulation, and following the framework set forth in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982),

[4] That no circuit to have addressed the issue, nor the United States Solicitor General, has attempted to defend § 7.4006 as an interpretation of the NBA only highlights the absurdity of that exercise. *See Nat'l City Bank v. Turnbaugh*, 2006 U.S. App. Lexis 20538, *8-*11 (4th Cir. Aug. 10, 2006); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314-16 (2d Cir. 2005); *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 962-63 (9th Cir. 2005); *see also* Brief for the United States as Amicus Curiae, *Burke v. Wachovia Bank, N.A.*, No. 05-431 (U.S. filed May 11, 2006).

asked whether § 7.4006 was a reasonable exercise of congressionally delegated preemption power. *Watters*, 431 F.3d at 560. Under *de la Cuesta*, a regulation validly preempts state law if (1) the agency intended to preempt state law; (2) it had the statutory authority to do so and the regulation was within the scope of that delegation; and (3) the agency's policy choice to exercise that authority was reasonable. *See* 458 U.S. at 153-54.

Even if OCC had attempted to justify § 7.4006 as a preemptive regulation under the *de la Cuesta* framework – which it did not[5] – that defense fails. In applying *de la Cuesta*, the Sixth Circuit mistakenly viewed the question of the agency's authority to promulgate the challenged regulation through the lens of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), *see Watters*, 431 F.3d at 561, when it should have considered the question de novo, *see, e.g., Gonzales v. Oregon*, 126 S. Ct. 904, 915 (2006); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). That is, instead of asking whether Congress intended to give OCC authority, to decide whether to preempt all state visitorial power over operating subsidiaries, the court asked whether Congress had directly spoken to the precise question of whether to exclude operating subsidiaries from the scope of the Comptroller's exclusive visitorial power over national banks. Finding no such unambiguous intent, the court deferred to OCC's regulation. *Watters*, 431 F.3d at 561-63.

But it is evident that Congress did not authorize OCC to preempt state regulation of any state-chartered entities. OCC's primary source of rulemaking authority, 12 U.S.C. § 93a, is a limited grant of authority to promulgate regulations that implement responsibilities OCC has been granted by statute. To be sure, part of OCC's responsibility is enforcement of the

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[5] "[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 50 (1983). The sound rationale for this rule is demonstrated in this case, where § 7.4006's rulemaking supplies no basis for finding a significant interference with federal law. *See NLRB v. Kentucky River Cnty Care, Inc.*, 532 U.S. 706, 714 n.1 (2001) (refusing to accept "a post hoc rationale for reasoning supplied by" the agency).

NBA, which includes interpreting the substantive meaning of the Act's provisions. But while OCC can render opinions on whether a state law conflicts with the NBA, nothing in the text or history of the Act gives OCC the power to promulgate legislative rules preempting state law, or to act as the primary regulator of state-chartered entities.

Given OCC's circumscribed rulemaking authority and the regulatory scheme embodied in the NBA – which permits OCC to exercise exclusive visitorial power over national banks but affords it only limited power to examine bank affiliates – it would be illogical to presume that Congress somehow implicitly granted OCC the discretion to exercise exclusive visitorial power over state-chartered entities. Such power would push Congress's own legislative authority to its outer limits by essentially federalizing state-chartered entities; it would derail the balance of federal and state regulatory authority over bank and nonbank entities; and it would destroy the competitive balance between the state and national banking systems that is embodied in the NBA.

Finally, OCC seeks to defend § 7.4006 by pointing to a similar regulation promulgated by the Office of Thrift Supervision ("OTS") that preempts state law as to operating subsidiaries of federal thrifts. This comparison is devoid of content and decidedly unpersuasive. It rests only on the fact that both national banks and federal thrifts are federally chartered, and ignores Congress' decision to give OTS more expansive rulemaking authority than that granted to OCC.

ARGUMENT

I

AN AGENCY'S ASSESSMENT OF ITS OWN AUTHORITY TO PREEMPT STATE LAW IS NOT SUBJECT TO DEFERENCE

Contrary to the Sixth Circuit's assumption, *Chevron* is implicated only where Congress has first delegated to an agency rulemaking authority to interpret a statute that it is charged with administering. Whether Congress has delegated that authority is a precondition to the application of *Chevron*, not its result. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (*Chevron* deference is warranted only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority"); *Gonzales*, 126 U.S. at 916 ("*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official.").

Accordingly, an agency's conclusion about whether Congress has delegated to it authority to act cannot itself be entitled to deference, for the self-evident reason that "[a]n agency may not confer power upon itself." *La. Pub. Serv. Comm'n*, 476 U.S. at 374. For example, a court does not defer to an agency's determination of whether a statute is ambiguous and thus delegates authority to the agency to fill the statutory gap. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (concluding after de novo review that the overall regulatory scheme of the Food, Drug, and Cosmetic Act made clear that Congress had forbidden the FDA to assert jurisdiction over tobacco). Similarly, "[w]hether [a] statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 473 (2001). Nor does a court defer to an agency on whether its

action is within the scope of its delegated authority. *See Gonzales*, 126 S. Ct. at 916.

This fundamental separation of powers principle carries special weight when the question involves preemption of state law, because of the additional federalism concerns at play. As this Court has frequently explained, "'an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.'" *New York v. FERC*, 535 U.S. 1, 18 (2002) (quoting *La. Pub. Serv. Comm'n*, 476 U.S. at 374). Thus, the question whether Congress has delegated to an agency the power to preempt state law is reviewed de novo.

For example, in *Gonzales*, the Court held that the Attorney General did not have the authority to interpret the Controlled Substances Act ("CSA") to preempt an Oregon law permitting physician-assisted suicide. *Gonzales*, 126 S. Ct. 904. The Court declined to apply *Chevron* deference to the rule's interpretation of the ambiguous term "legitimate medical purpose" in the CSA because - after reviewing the CSA's delegation provision - it concluded that the rule was beyond the scope of that delegation. *Id.* at 918. Although the Court described the delegation provision as "oblique," it considered the delegation question de novo, reviewing the text of the delegation provision, the functions of the Attorney General, and the design of the CSA. *Gonzales*, 126 S. Ct. at 916-21.

Similarly, in *New York v. FERC*, in concluding that the Federal Energy Regulatory Commission acted within the scope of its delegated authority in seeking to preempt state law, the Court stated that it would interpret the authorizing statue "without any presumption one way or the other." 535 U.S. at 18. The Court reviewed the text of the Federal Power Act, its extensive legislative history (dating back to 1935), and relevant energy policy, without applying *Chevron* or otherwise deferring to FERC's interpretation. *Id.* at 18-25.

These more recent holdings are consistent with *Louisiana Public Service Commission*, an earlier regulatory preemption case in which the Court held that the Communications Act of

1934 did not authorize the FCC to preempt depreciation methods used by States to set rates for intrastate telephone service. The Court analyzed the "language, structure, and legislative history of the Act" without reference to *Chevron* or deference to the agency, 476 U.S. at 359, even though, "[l]ike many statutes, the Act contain[ed] some internal inconsistencies, vague language, and areas of uncertainty," *id.* at 379. *See also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-85 (1999) (considering whether the 1996 Telecommunications Act authorized FCC to set rates for intrastate telephone service that would preempt contrary state rules, without giving any deference to the FCC); *cf. Verizon Communications Inc. v. FCC*, 535 U.S. 467, 501-02 (2002) (deferring to FCC on whether the specific method for setting rates devised by FCC under the 1996 Act was reasonable).

Likewise, in *City of New York v. FCC*, 486 U.S. 57, 66-69 (1988), the Court did not rely on *Chevron* to conclude that the 1984 Cable Act authorized the FCC to preempt state and local technical standards for cable television signals. Instead, the Court conducted an independent review of the text, legislative history, and regulatory background of the Act. While the Court did twice cite to FCC findings, it did so not in deference to the agency's interpretation of the Cable Act, but in support of the Court's own reading of the statute as sanctioning the FCC's decade-old preemption of local technical standards, and thereby authorizing continuing preemption. *Id.* at 68 n.4, 69; *see also Capitol Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699-700 (1984) (holding, without deference to the agency, that Congress had delegated to the FCC broad regulatory authority).

And in *de la Cuesta* itself, considered the seminal regulatory preemption case, it was the Court's own detailed analysis of the specific "language and history of [the Home Owners' Loan Act ("HOLA")]," 458 U.S. at 159, that convinced it both that Congress had delegated to the Federal Home Loan Bank Board ("FHLBB")[6] the power to promulgate regulations exempting federal savings and loans from the requirements

[6] Now OTS. *See* Pub. L. No. 101-73 §§ 401-02, 103 Stat. 183, 354-60 (1989); 54 Fed. Reg. 34,637 (Aug. 21, 1989); 54 Fed. Reg. 49,411 (Nov. 30, 1989).

of state law, *id.* at 159-67, and that the specific regulation at issue expressly preempting state restrictions on certain clauses in mortgage agreements was within the scope of that authority, *id.* at 167-69. It was only after reaching those independent conclusions that the Court turned its attention to the "wisdom of the Board's policy decision" to preempt state law. *Id.* at 169. Although that policy was contested, the Court deferred to the Board regarding the economic soundness of its approach, concluding that it "reasonably exercised the authority, given to it by Congress," to "ensure the financial stability of" federal thrifts. *Id.* at 170; *see also United States v. Shimer*, 367 U.S. 374, 382-83 (1961) (deferring not to whether the agency's regulations were authorized by statute, but to its reasonable policy choice in deciding to preempt state law).

Accordingly, the Sixth Circuit erred by applying *Chevron* to the question of the agency's authority to promulgate a preemptive regulation. The question of whether OCC acted within the scope of its delegated rulemaking authority in enacting § 7.4006 is decided prior to application of *Chevron* or other deferential review. The question is not, as the court below framed it, whether Congress has spoken directly to the issue – as it would be at the first step of *Chevron* – but rather, whether Congress intended to authorize OCC to make the preemption decision it did.[7]

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[7] Even if the question in this case were not viewed as one of regulatory preemption, as the Sixth Circuit framed it, but as the agency's interpretation of a bank's "incidental powers," 12 U.S.C. § 24 (Seventh), *Chevron* deference would still be inappropriate. In that event, OCC would not be simply defining the incidental powers of a national bank as including a bank's ability to own an operating subsidiary, which the agency has already done, *see* 12 C.F.R. § 5.34; it would be making the additional determination that the bank's power to own a subsidiary preempts application of state law to that subsidiary. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996) (assuming without deciding that the question of a statute's preemptive effect "must always be decided *de novo* by the courts"); *Medtronic Inc. v. Lohr*, 518 U.S. 470, 512 (1996) (O'Connor, J., concurring in part and dissenting in part) ("It is not certain that an agency regulation determining the pre-emptive effect of any federal statute is entitled to deference . . . .") *Nixon v. Mo. Mun. League*, 541 U.S. 125, 128-41 (2004) (affirming FCC's interpretation of an express preemption provision without the benefit of *Chevron* deference)..

II

SECTION 7.4006 IS NOT AUTHORIZED BY THE NBA

Upon de novo consideration, it is clear that Congress did not intend to provide OCC with rulemaking authority to preempt state regulation of state-chartered corporations.[8] OCC first allowed national banks to use operating subsidiaries to engage in the business of banking in 1966. *See* 31 Fed. Reg. 11,459 (Aug. 31, 1966). It justified that regulation as an exercise of its authority to interpret a national bank's "incidental powers," set forth at 12 U.S.C. § 24 (Seventh). *See* 31 Fed. Reg. at 11,460; *see also Nationsbank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257-60 (1995) (deferring to OCC's opinion that selling annuities is within a bank's "incidental powers"). OCC now attempts to use that same statutory authority to shield subsidiaries from application of state law to the same extent that the parent bank is protected. OCC lacks the power to do this, and § 7.4006 is therefore invalid. *Cf. Iowa Utils. Bd.*, 525 U.S. at 427 (Breyer, J., concurring in part and dissenting in part) ("FCC's reach has exceeded its legal grasp").

A. OCC Does Not Have Authority to Promulgate a Legislative Rule Preempting State Law.

"[T]he best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *City of New York*, 486 U.S. at 66 (quoting *La. Pub. Serv. Comm'n*, 476 U.S. at 374); *accord Gonzales*, 126 S. Ct. at 916. The principal grant of rulemaking authority to OCC empowers the Comptroller "to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a. As the text of that provision

[8] Section 7.4006 does not meet the other *de la Cuesta* elements, either. For example, OCC disclaims any intent to preempt state law, *see* 66 Fed. Reg. at 34,790, and accordingly has made no attempt to satisfy applicable standards of conflict preemption. *See Barnett Bank*, 517 U.S. at 33. Nor is the regulation a reasonable exercise of any preemptive power OCC might have, for the reasons discussed here and in the briefs of Petitioner and other amici.

makes clear, OCC's rulemaking authority under § 93a is only "as broad as OCC's statutory responsibilities, defined piecemeal throughout the [National] Bank Act." *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d at 958.

Section 93a is similar to the grant of rulemaking authority in the CSA that was at issue in *Gonzales*. The CSA authorizes the Attorney General to promulgate rules and regulations "which he may deem necessary and appropriate for the efficient execution of his functions" under the Act. *Gonzales*, 126 S. Ct. at 917. In ruling that a regulation promulgated by the Attorney General fell outside the scope of that delegation, the Court distinguished between narrow delegation provisions such as that in the CSA, whose scope is defined by reference to the statutory responsibilities of an administrative officer, and more expansive provisions that entrust agencies with rulemaking authority "to carry out or effect all provisions" of a statute. *Id.*[9] Section 93a is plainly of the more circumscribed variety.

The legislative history of § 93a confirms that it is defined in reference to the Comptroller's statutory responsibilities. The Senate floor manager explained the provision as follows:

> [Section 93a] is only available to carry out the responsibilities of the [OCC and] carries with it no new authority to confer on national banks powers which they do not have under existing substantive law. To give national banks authority under this rulemaking provision which they otherwise do not possess under existing substantive law would not be carrying out the responsibilities of the [OCC] since only Congress can define those responsibilities so as to confer powers on national banks.

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[9] As examples of the more expansive provisions, the Court cited the Telecommunications Act, 47 U.S.C. § 201(b), which delegates to the FCC the authority to "'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act," and the Truth in Lending Act, 15 U.S.C. § 1604(a), which delegates to the Federal Reserve Board the authority to prescribe regulations "as, in the judgment of the Board, 'are necessary or proper to effectuate the purpose of' the statute." *Gonzales*, 126 S. Ct. at 916.

126 Cong. Rec. 6902 (1980) (remarks of Sen. Proxmire); *see also* H.R. Rep. No. 96-842, at 83 (1980), *reprinted in* 1980 U.S.C.C.A.N. 298, 313 (§ 93a "carries no authority to permit otherwise impermissible activities of national banks"); 126 Cong. Rec. 6971 (1980) (Rep. St. Germain, House floor manager) (same).

While OCC's responsibilities include enforcement of the NBA, and the Comptroller's deliberative conclusions as to the meaning of that law are entitled to deference, *see Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987), that power does not include the authority to promulgate a regulation carrying the force of law which determines the preemptive scope of the NBA. *See Gonzales*, 126 S. Ct. at 919 ("a delegation of authority to an agency to promulgate . . . *'standards'* did not include the authority to decide the pre-emptive scope of the federal statute because 'no such delegation regarding the statute's enforcement provisions is evident in the statute" (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) (brackets omitted))). When Congress has delegated authority to make legislative rules preempting state laws, it generally has done so directly. *See, e.g.*, 12 U.S.C. § 1464(a) (HOLA); 30 U.S.C. § 1254(g) (Surfacing Mining Control and Reclamation Act); 47 U.S.C. § 253(d) (Telecommunications Act of 1996); 49 U.S.C. § 5125(d) (Hazardous Materials Transportation Act). The NBA lacks any such authorization.

The historical background of the NBA helps explain why Congress has not afforded the Comptroller power to preempt state law. Congress first authorized the chartering of national banks in 1863. From the beginning, States were denied the right to examine the newly created national banks or monitor their financial conditions, *see* National Currency Act, ch. 58, § 51, 12 Stat. 665, 680 (now codified at 12 U.S.C. § 484), but state law otherwise generally applied to the operation of the banks absent a conflict with federal law, *see Nat'l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1869) (national banks "are governed in their daily course of business far more by the laws of the State than of the nation"); *accord Waite v. Dowley*, 94 U.S. 527, 533 (1877); *McClellan v. Chipman*, 164 U.S. 347 (1896).

To this day, the Court recognizes that state laws apply to national banks unless they "impair significantly[] the exercise of a power that Congress *explicitly granted*." *Barnett Bank*, 517 U.S. at 33 (emphasis added); *see also Atherton v. FDIC*, 519 U.S. 213, 223 (1997) ("[t]o point to a federal charter by itself shows no conflict[or] threat") (collecting cases); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 (1954); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944) ("This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions."); *Lewis v. Fid. & Deposit Co.*, 292 U.S. 559, 564-66 (1934). And Congress recently expressly reaffirmed the importance of subjecting national banks to certain state laws to protect significant state interests. *See* 12 U.S.C. § 36(f) (host state laws regarding community reinvestment, consumer protection, fair lending, and branching apply to out-of-state national bank branches); H.R. Conf. Rep. No. 103-651, at 53, *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074 (noting States' "strong interest" in the activities of both national and state banks operating in their jurisdictions); *see also* 12 U.S.C. § 43 (imposing heightened procedural requirements for OCC opinion letters and interpretive rules that determine that federal law preempts state community reinvestment, consumer protection, fair lending, and branching laws).

Section § 93a's limited delegation thus cannot be read as an implicit grant of authority to OCC to promulgate legislative rules preempting state laws, which generally apply to national banks unless they conflict with an explicit grant of authority in the NBA. In the words of the former Comptroller, "the OCC has no self-executing power to preempt state law." Comptroller of the Currency John D. Hawke, Jr., Remarks Before the Women in Housing and Finance (Feb. 12, 2002), *available at http://www.occ.treas.gov/ftp/release/2002-10a.txt*. Rather, the Comptroller "renders opinions, using well recognized standards developed by the courts, as to whether or not a federal law does, or does not, preempt a state law." GAO Report No. B-284372, *Role of the Office of Thrift Supervision and Office of the Comptroller of the Currency in the Preemption of*

State Law (Feb. 7, 2000), at 38 (letter from Chairman Hawke, Jan. 31, 2000); *id.* ("OCC does not choose 'to preempt;' it is federal law that preempts").

B. The Comptroller Is Not Authorized to Act as the Primary Regulator of a Bank's Operating Subsidiaries.

Nor has Congress given the Comptroller power to exercise primary regulatory authority over a national bank's operating subsidiaries or any other state-chartered entity, and indeed, Congress has expressed an affirmative intent not to do so. Pursuant to the NBA's regulatory structure, while the Comptroller has the responsibility to examine and report on the condition of a national bank, and its visitorial power over that bank is exclusive, it does not have the same degree of control over the bank's subsidiaries.

The Comptroller's visitorial power over national banks is authorized by 12 U.S.C. § 481. He is required to "examine," or "visit,"[10] national banks and make a report of their "condition." *Id.* He is also authorized to examine the banks' affiliates, but the purpose of that examination is not to discover the condition of the affiliate, per se, but to "disclose fully the relation between such bank and such affiliates and the effect of such relations upon the affairs of such bank." *Id.*

In addition to submitting to examination, each national bank is required to submit to the Comptroller periodic "reports of condition," to include "in detail" the bank's "resources and liabilities," *id.*, and "payment of dividends," *id.* § 161(b). Submission of corresponding affiliate reports is the duty of the parent bank, not the affiliate, and like the affiliate examination, they are not targeted at the affiliate per se, but are required to contain only such information as "shall be necessary to disclose fully the relations between such affiliate

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[10] The Congress that enacted the NBA used "visitation" and "examination" interchangeably. *See, e.g.*, Cong. Globe, 37th Cong., 3d Sess. 824 (1863); *see also Dunn v. O'Connor*, 89 F.2d 820, 824 (D.C. Cir. 1937) (discussing another early statute that referred to the Comptroller's examination power as "visitorial powers.").

and such bank and to enable the Comptroller to inform himself as to the effect of such relations upon the affairs of such bank." *Id.* § 161(c). If the affiliate refuses to submit to an examination or provide information to the Comptroller, or pay any assessments, fees or charges levied by the Comptroller, recourse is with the bank, not the affiliate. *Id.*[11]

The most notable statutory difference in the NBA's treatment of national banks and their affiliates is that OCC's visitorial powers over national banks is virtually exclusive, but its power over affiliates is not. 12 U.S.C. § 484, entitled "Limitation on visitorial powers," provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or . . . exercised or directed by Congress." Section 484, by its terms, applies only to national banks. Neither it, nor any other provision of the NBA, limits visitorial powers over a national bank's affiliates.[12]

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[11] An operating subsidiary fits squarely within the definition of "affiliate" in this scheme. Indeed, the Comptroller's only power to examine an operating subsidiary flows from its power to examine an "affiliate," which is a category that includes not only operating subsidiaries, but also, for example, other types of subsidiaries and bank holding companies. *See* 12 U.S.C. § 221a(b) (defining "affiliate" as, *inter alia*, a corporation or similar entity controlled by a national bank); 12 C.F.R. § 5.34(e)(2), (3) (defining an "operating subsidiary as a corporation or similar entity controlled by a national bank, and that engages in only the activities that are authorized for the bank); *see also* S. Rep. No. 73-77, at 10, 16, 17 (1933); 77 Cong. Rec. 3835-36 (1933) (remarks of Rep. Steagall).

When Congress intended to differentiate between types of affiliates, for example with respect to restrictions on financial transactions between the bank and its affiliates, it did so explicitly. *See, e.g.*, 12 U.S.C. § 371c(b)(2)(A); 12 U.S.C. § 371c-1(d)(1); S. Rep. No. 73-77, at 15, 17 (explaining that certain types of affiliates are exempted from § 371c).

[12] Indisputably, a subsidiary of a national bank is not itself a national bank. Some of the more obvious indicia are that the subsidiary does not have a federal charter, *see* 12 U.S.C. § 27, it is not a member of the Federal Reserve System, *see* 12 U.S.C. §§ 282, 501a, and it is not required to maintain FDIC depository insurance, *see* 12 U.S.C. §§ 1814, 1815.

Moreover, because it is a basic tenet of corporate law that a subsidiary has a corporate status independent of its parent bank, had Congress

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Congress's failure to amend § 484 to limit visitorial powers over operating subsidiaries only bolsters the conclusion that it did not intend the Comptroller to serve as their primary regulator. Section 484 was last amended in 1983, *see* Act of Jan. 12, 1983, Pub. L. No. 97-457, § 23(a), 96 Stat. 2507, 2510, when Congress made minor technical changes, and the provision has remained essentially unchanged since it was first enacted in 1863, *see* National Currency Act, § 51, ch. 58, 12 Stat. 665 (1863). In the meantime, Congress gave OCC limited power to examine affiliates in 1933, *see* Banking Act of 1933, § 5(c), ch. 89, 48 Stat. 162, 165 (1933), and OCC has, since 1966, permitted national banks to operate through subsidiaries. *See* 31 Fed. Reg. at 11,459. Had Congress wished to extend OCC's powers over these subsidiaries, it had ample opportunity to do so. *Cf. Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 448-49 (2005) (if Congress had intended a statutory provision to read the way respondent suggested, it would have used different language).

Other federal banking laws are consistent with Congress's affirmative intent not to assign the Comptroller the role of primary regulator of any state entities. For example, for purposes of the Alternative Mortgage Transactions Parity Act of 1982, state-chartered entities - including operating subsidiaries of national banks - are subject to OTS regulation, while national banks are governed by OCC. *See* 12 U.S.C. § 3803(a); 12 C.F.R. § 34.24; *cf. Gonzales*, 126 S. Ct. at 921 (determining that the structure of the CSA conveys an unwillingness to cede power to the Attorney General).

OCC has disregarded this intent not to permit the Comptroller to entrench himself as the sole regulator of a bank's subsidiaries. Under the guise of interpreting a national bank's incidental powers, *see* 69 Fed. Reg. at 1900, it has

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intended to treat operating subsidiaries and national banks as one for purposes of § 484's visitorial powers' provision, it must be assumed that it would have done so explicitly. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 474, 476 (2003); *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998); *see also* Br. for the Nat'l Ass'n of Realtors as *Amicus Curiae* in Supp. of Pets. 8-11.

preempted virtually all state regulation of these state corporations. The notion that this provision gives the Comptroller "such broad and unusual authority through an implicit delegation . . . is not sustainable." *Gonzales*, 126 U.S. at 921; *cf. Iowa Utils. Bd.*, 525 U.S. at 381 n.8 (FCC could not regulate aspects of intrastate communication not governed by the 1996 Telecommunications Act "on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction").

C. Congress Would Not Implicitly Empower a Federal Agency to Act as the Primary Regulator of State-Created Entities or Otherwise Undermine the Dual Banking System.

Against this evidence that Congress imbued the Comptroller with only those powers enumerated by statute – which plainly do not include comprehensive or exclusive regulatory authority over a national bank's operating subsidiaries – Respondents would have this Court presume that Congress has implicitly allowed the Comptroller to arrogate to himself exactly that power. This position is untenable. "[t]he background principles of our federal system . . . belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States[]. . . ." *Gonzales*, 126 S. Ct. at 925.

Operating subsidiaries of national banks are generally incorporated under state law. *See* 12 C.F.R. § 5.34(e)(2). "A corporation is a juristic person organized by government to accomplish certain ends, which may be public or quasi-public. . . They have been given corporate capacity in the belief that their creation will advance the common weal." *Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 336-37 (1935). Incorporation under the laws of a State creates obligations as well as privileges for a corporation. The corporation gains the privilege of conducting business in that State as a corporation, with the powers attendant with that status. In return, the State may condition that privilege as it

deems appropriate for the protection of its citizens. *See CTS Corp.*, 481 U.S. at 89; *BT Inv. Managers, Inc.*, 447 U.S. at 38; *Union Brokerage Co.*, 322 U.S. at 208. Indeed, "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations." *CTS Corp.*, 481 U.S. at 89. "How they shall be formed, how maintained and supervised, and how and when dissolved, are matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision." *Hopkins*, 296 U.S. at 337; *accord Chicago Title & Trust Co. v. 4136 Wilcox Bldg. Corp.*, 302 U.S. 120, 127 (1937) ("How long and under what terms a state-created corporation may continue to exist is a matter exclusively of state power.").

If valid, § 7.4006 would presumably render state-chartered operating subsidiaries subject to OCC's regulations on corporate practices, *see* 12 C.F.R. pt. 7, subpt. B, rather than those provided by state law. Subpart B includes, among other things, requirements for holding shareholders' meetings, electing directors, voting, stock ownership, compensation plans, and stock transfers. Section 7.4006 would also nullify state regulators' authority over these state entities, *see* 12 C.F.R. § 7.4000, including the state licensing requirement at issue here, *see* 66 Fed. Reg. at 34,788. In sum, § 7.4006 would subject state corporations to federal law in most, if not all, all significant respects.

To the extent that § 7.4006 essentially federalizes state-chartered corporations without the consent of the State, and without a finding of conflict with some superior federal interest, it would raise significant Tenth Amendment concerns. *See Hopkins*, 296 U.S. at 338. No such significant interference with federal law has been identified by § 7.4006's rulemaking, which cites as the basis for the preemption merely that the subsidiary is a "convenient and useful corporate form" through which the bank can do business. 66 Fed. Reg. at 34,788.

Nor is it evident that a conflict with a federal interest could be identified. For example, it would take more than OCC's bald and fundamentally incorrect assertion that a subsidiary

is equivalent to a department of the parent bank, *id.*, to show significant impairment from state licensing of a state subsidiary, especially since the bank is generally shielded from liability for the actions of its subsidiaries. *See Union Brokerage Co.*, 322 U.S. at 208 (state licensing law not preempted by federal regulation of customhouse brokers because the federal law dealt with the manner in which the business was carried out, and the State was concerned with safeguarding the interests of its own people). Moreover, state regulation of financial subsidiaries[13] and other types of bank affiliates is not affected by § 7.4006. Given the ease of converting from one type of affiliate to another,[14] it is clear that the federal power being flexed is "not exclusive, but at most concurrent," *Hopkins*, 296 U.S. at 338, and that "[w]hat is really troubling [Respondents]" is not a conflict between state and federal law, but "their sense that state regulators will not allow them sufficient revenues." *La. Pub. Serv. Comm'n*, 476 U.S. at 386.[15]

Congress does not casually authorize an agency to take an action that would raise significant constitutional concerns. *See SWANC v. U.S. Army Corps. Of Eng'rs*, 531 U.S. 159, 172 (2001) (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)); *cf. Whitman*, 531 U.S. at 472. But § 7.4006 does just that, by transferring all significant regulatory authority over state-chartered corporations from the state to the federal government, without

[13] "Financial subsidiary" is defined in 12 U.S.C. § 24a and 12 C.F.R. § 5.39.

[14] *See* 12 C.F.R. § 5.34(e)(5)(iv), (vi). Soon after § 7.4006 was promulgated, Petitioner Wachovia Mortgage Corporation converted to an operating subsidiary of Petitioner Wachovia Bank, N.A., and suddenly claimed preemption of Michigan's licensing laws. *See Watters*, 431 F.3d at 558.

[15] That the Commerce Clause may permit federal regulation of operating subsidiaries does not resolve the Tenth Amendment concern, as OCC suggests, *see* 69 Fed. Reg. at 1901, as the question is not whether the federal government can regulate state chartered subsidiaries, but whether it can do so exclusively without the States' consent and without satisfying conflict preemption standards.

the consent of the chartering jurisdiction and apparently with no legitimate basis for preemption. *See Hopkins*, 296 U.S. at 338.

Moreover, that concern is heightened where, as here, the agency action "alters the federal-state framework by permitting federal encroachment upon a traditional state power," *SWANC*, 531 U.S. at 173; *see also Gonzales*, 126 S. Ct. at 925. Section 7.4006 does this by intruding on traditional state authority to regulate the internal governance and operations of state-created entities. "The longstanding prevalence of state regulation in [the area of corporate governance] suggests that, if Congress had intended to pre-empt all state laws [in this area], it would have said so explicitly." *CTS Corp.*, 481 U.S. at 86; *see also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544-46 (1994) (infringing on essential state interest in securing real estate requires clear statement); *cf. Nixon*, 541 U.S. at 140-41 (preemption of state arrangements for conducting its own government requires clear statement); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (infringing on core state function of regulating its judiciary requires clear statement).

Finally, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman*, 531 U.S. at 468. Thus, it would be odd, to say the least, for Congress to have authorized OCC - an agency funded almost exclusively by the national banks that it oversees - to so profoundly and predictably upset "the policy of competitive equality" between state and national banks "firmly embedded in the statutes governing the national banking system." *First Nat'l Bank v. Dickinson*, 396 U.S. 122, 133 (1969); *see also First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966); *Lewis v. Fid. & Deposit Co.*, 292 U.S. at 564-66. But the regulation does precisely that by encouraging state-chartered banks to convert to a federal charter to avoid enforcement of state law against their subsidiaries.

III

AN UNTESTED OTS RULE CANNOT SERVE AS PRECEDENT FOR SECTION 7.4006

OCC defends its rule by comparing it to a similar regulation promulgated by OTS, 12 C.F.R. § 559.3(n), governing application of state law to operating subsidiaries of federal thrifts, *see* 69 Fed. Reg. at 1901 even though OTS's regulation has never been sanctioned by any federal appellate court or by Congress. *See* 66 Fed. Reg. at 34,789. In any event, OCC's reasoning behind the comparison – that both national banks and federal thrifts have federal charters, *id.*, is utterly vapid.

OTS operates under a more expansive grant of authority than does OCC, which is evident by comparing the purpose, text, and legislative history of HOLA and the NBA. A federal thrift "is not a national bank and the powers and duties of the two materially differ. As to national banks, Congress expressly left open a field for state regulation and the application of state laws . . . ." *People v. Coast Fed. Sav. & Loan Ass'n*, 98 F. Supp. 311, 319 (S.D. Cal. 1951) (quotation marks omitted), *cited in de la Cuesta*, 458 U.S. at 145.

In contrast to the narrow grant of rulemaking authority to OCC discussed above, *see supra* at 11-15, this Court has described OTS's regulatory authority as affording it the power to preempt conflicting state law. *de la Cuesta*, 458 U.S. at 160-62; *id.* at 159 n.14 (qualifying that the Court was not deciding whether FHLBB occupies the field of federal savings and loan regulation); *see also id.* at 171 (O'Connor, J., concurring) (FHLBB's authority to preempt state law is not limitless). OCC's power is not nearly so expansive, and does not include the power to preempt state law, as discussed above.

OTS's broader authority is manifested by the text and legislative history of HOLA, which stand in stark contrast to that of the National Bank Act. HOLA was "a product of the Great Depression . . . [and] was intended to 'provide emergency relief with respect to home mortgage indebtedness' at a time when as many as half of all home loans in the country

were in default." *Id.* at 159 (citations omitted). Congress enacted HOLA as a "radical and comprehensive response to the inadequacies of the existing state system." *Id.* at 160. Because it enacted the statute hurriedly in order "to provide for the 'relief of the man who is about to lose his home,'" setting out the general framework and leaving the details to the FHLBB, Congress gave the FHLBB "broad discretion to regulate the newly created federal savings and loans." *Id.* at 163-64 (citation omitted).

This grant of authority is set forth in HOLA's expansive delegation provision, which is essentially the same today as it was at the time *de la Cuesta* was decided, and is notably broader than anything in the NBA:

> In order to provide thrift institutions for the deposit of funds and for the extension of credit for homes, [OTS] is authorized, under such regulations as [OTS] may prescribe - (1) to provide for the organization, incorporation, examination, operation, and regulation of [federal thrift] associations . . . and (2) to issue charters therefor, *giving primary consideration to the best practices of thrift institutions in the United States.*

12 U.S.C. § 1464(a)(1) (emphasis added). OTS's mandate to consider the "best practices" of certain state institutions plainly indicated to the Court that Congress "expressly contemplated, and approved, the [FHLBB]'s promulgation of regulations superseding state law." *de la Cuesta*, 458 U.S. at 162. The NBA has no analogous provision governing the Comptroller's authority.[16]

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[16] While HOLA does have a provision similar in wording to § 93a, that provision does not encompass the authority granted OTS in § 1464(a)(1). *See* 12 U.S.C. § 1 (providing the Comptroller with the same authority provided OTS in § 1462a(b)(3), but not citing the "best practices" provision, § 1464(a)(1), discussed in *de la Cuesta*).

As this Court has noted, HOLA's legislative history stresses the need for uniformity among the federal savings and loans: "Congress delegated to [FHLBB] broad authority to establish and regulate 'a uniform system of savings and loan institutions, . . . with the force of the government behind them,'" *Id.* at 166 (brackets omitted). That Congress does not see the same need for uniformity in the national banking system is apparent given that OTS has for decades permitted federal thrifts to branch interstate without regard to conflicting state law, *see* GAO Report No. B-284372, at 24 & n.25, even while Congress has within the last decade provided that state branching and other laws apply to national banks, *see* Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, 12 U.S.C. § 36(f); H.R. Conf. Rep. No. 103-651, at 53; *see also* GAO Report No. B-284372, at 22 & n.15 (citing cases to the effect that federal thrifts are "uniquely federalized institutions – even distinguishable from national banks.").

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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